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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

J. N. FLOWERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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Counsel for Respondent.

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BRIEF FOR THE RESPONDENT

Question Presented

Whether taxpayer's expenses incurred in 1939-1940 on business trips away from his established home were deductible expenses under Section 23(a)(1) of the Revenue Act of 1938.

The answer to this question depends upon the meaning of the word "home" as used in that statute. Respondent contends, and the Circuit Court of Appeals so held, that

the word was used with its commonly accepted meaning; the Petitioner contends that the word is to be given a special and unusual meaning.

The statement of the question appearing at page 2 of the brief for Petitioner is not correct. The taxpayer did not at any time reside in Mobile, where his employer was domiciled nor was any claim made as for expenses incident to trips from the city of Mobile to the city where he had his established residence.

Statement

Respondent throughout the year 1939 and 1940 had his home in Jackson, Mississippi, where he had lived with his family continuously since January 1, 1903 (R. 33). He had lived with his family on the same lot at 1505 North State Street since 1912, on which lot he had built his present house in 1917 and 1918 (R. 34). He was, in the years 1939 and 1940 and had for some thirty-five years been, a voter in Jackson; filed his federal income tax returns there; paid his state income taxes to the State of Mississippi; belonged to a church and a country club in that city; paid his privilege license to practice law to the City of Jackson and to the County of Hinds, in which said city is located (R. 34). In the said years, and ever since the first of January, 1906, he had maintained a law office in the city of Jackson and was a member of a law firm in that city (R. 36). He accepted the position of General Solicitor of a railroad company in 1927, with the understanding that he would continue to maintain his residence in Jackson (R. 35). He testified that he was "fairly well established in Jackson . . . the people I knew lived there and I had my home there and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which

I did take it had required me to move to Mobile * * * and besides I had my firm there * * * and besides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year I would have something to go to * * * I did not know one year whether I would be elected the next year or not" (R. 35-36). It was understood that Respondent in the performance of his duties as General Solicitor would decide for himself how often he should go to Mobile and that he would have to pay the expenses incident to his trips to Mobile (R. 35). There was no understanding with respect to expenses at home (as stated at page 3 of the brief for petitioner). Counsel for Respondent refer to findings of fact of the Tax Court (R. 15). But there is no evidence to support the statement that there was an understanding with his employer that Respondent's home expenses would have to be paid by him. Of course his employer was not concerned with his home expenses. In 1939 Respondent made thirty-three trips to Mobile, averaging two days per trip in Mobile, and in 1940 he made forty trips averaging about two and a half days each. Throughout the years Respondent had his complete home establishment in Jackson, the home organization being kept intact while he made his trips to Mobile on the business of the railroad company, and as far as taxpayer could estimate there was no reduction in his home expenses occasioned by his absence (R. 48). The deduction of his expenses incident to trips to Mobile was allowed the taxpayer for the years prior to 1939, though an explanation of the item was required by the examiners each year (R. 40).

This statement is made to supplement and in some instances to correct the Statement of Facts made in brief for Petitioner, beginning at page 2 thereof.

Summary of Argument

There is no dispute as to the facts. The taxpayer was the only witness examined and what he said was accepted by the Tax Court and by the Circuit Court of Appeals. In every sense of the word the Respondent had his established "home" in Jackson, Mississippi. He had lived on the same lot for twenty-seven years. There he maintained his family, with the usual home organization. He did not locate his home with reference to his job with the Railroad; his home was already established and he accepted the position with the Railroad with the understanding that he might remain where he was and would not be required to change his residence and move his family to Mobile. These admitted facts create the occasion to define the word "home" as used in Section 23(a)(1) of the Revenue Act of 1938. The Respondent contends that the word was used with its universally accepted meaning; that there is nothing in the statute to indicate that any other meaning was intended; that the early cases, beginning with the *Bixler* case (in 1927), were not fully considered, were decided wrong; that the error made in the earlier cases has been to an extent mitigated by later decisions of the Board of Tax Appeals and by the Tax Court; that the Courts of Appeals of the Second, Fifth, and Ninth Circuits have corrected the mistake first made by the Board of Tax Appeals. The Respondent will insist that the Congress did not intend in any of its acts to impose an income tax upon other than net income; that it is the policy of the statutes to allow the expenses of earning income to be deducted from the gross in computing the amount upon which the tax is laid; that the Congress does not concern itself with the citizen's selection of a place to set up his home and maintain his family; does not intend to discourage or embarrass the preservation of the home establishment; does not require

that homes be broken up or moved in order that the citizen may produce for the government more revenue.

Further it will be contended that the authors of the statute used a word with which they were entirely familiar; that in instances where the Congress intended to have allowable expenses measured from some particular place or location such place or location was described.

ARGUMENT

I

The Word "Home" in Section 23(a)(1) of the Revenue Act of 1938 Should Be Understood and Applied in Its Ordinary Sense and Should not Be Construed as Meaning the Taxpayer's Place of Business, Employment, or the Post or Station at Which He Is Employed.

The full text of Section 23(a)(1) as it appears in the Revenue Act of 1938 is set forth below. This section of the law permits the taxpayer to deduct from his gross in-

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"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) EXPENSES:

(1) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

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come "traveling expenses (including the entire amount expended for meals a l lodging) while away from home

in the pursuit of a trade or business" in arriving at his net income to which the tax rates are applied.

Here it is admitted that the expenses the Respondent claimed the right to deduct, and the deduction of which was allowed him by the Circuit Court of Appeals, were traveling expenses including expenses for meals and lodging while he was in the pursuit of the trade or business in which he was engaged. There is no dispute as to the points between which the traveling occurred and the place at which the expenses for meals and lodging arose. All of the traveling was between Jackson, Mississippi, and Mobile, Alabama, and all of the expense for meals and lodging was at Mobile, Alabama, or enroute between Jackson and Mobile.

The question is, Which of the two places, Mobile or Jackson, was the Respondent's "home" within the meaning of Section 23(a)(1)? This question, however, cannot be answered until there is first answered the question, What does the word "home" in Section 23(a)(1) mean? It is the answer to this last question to which we will devote this subdivision of our brief.

a. THE DEFINITION GIVEN THE WORD "HOME" BY THE PETITIONER AND THE TAX COURT IS WITHOUT SUPPORT. THERE IS IN THE STATUTE NOTHING TO SUGGEST THAT THE WORD WAS NOT USED WITH ITS OBVIOUS AND ORDINARY MEANING.

The Petitioner and the Tax Court of the United States (formerly Board of Tax Appeals) have, for themselves, answered this question. The following extract from the opinion of the Tax Court in *William R. Wallace, Jr.* v. *Commissioner, Ina Claire Wallace* v. *Commissioner* (Memo. Decisions Docket Nos. 110143, 110144. Entered May 7, 1943), illustrates and emphasizes their answer to this question:

"The cases relied upon by the respondent include *Mort L. Bixler*, 3 B. T. A. 1181; *Charles E. Duncan*, 17

B. T. A. 1088; affd., 47 Fed. (2d) 1082; *George W. Lindsay*, 34 B. T. A. 840, and *Walter M. Priddy*, 43 B. T. A. 18. We held in *Walter M. Priddy, supra*, that the living expenses of the taxpayer for a portion of the taxable year when he was required to be away from his permanent home and his family were not deductible. In our opinion we said:

"'The dispute centers around the location of Priddy's "home" as that term is used in section 23(a) of the Revenue Acts of 1934 and 1936. In *Mort L. Bixler*, 5 B. T. A. 1181, we said that a taxpayer's "home," as that term was used in the statute, was his "place of business, employment, or the post or station at which he is employed." We held that a taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business and take a deduction for his living expenses while away from such residence or deduct traveling expenses for trips between his place of business and such residence. That case has been consistently followed. *Charles E. Duncan*, 17 B. T. A. 1088; affd., 47 Fed. (2d) 1082; *Jennie A. Peters*, 19 B. T. A. 901; and *George W. Lindsay*, 34 B. T. A. 840.'

* * * * * * *

"Petitioners contend, and we think correctly, that after their marriage San Francisco was the domicile or legal residence of both petitioners. However, as we have pointed out in the cases cited above, section 23(a) is not concerned with legal residence. It refers to the taxpayer's 'home,' which we have construed to mean the taxpayer's 'place of business, employment, or the post or station at which he is employed.' *Mort L. Bixler, supra.*"

Respondent's answer to this question has been set forth in striking fashion by the United States Circuit Court of Appeals for the Ninth Circuit when that Court reversed the above-quoted decision of the Tax Court (*Wallace* v.

Commissioner of Internal Revenue (two cases)[1] the Court saying, in part, as follows:

> "Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression 'away from home in the pursuit of a trade or business' in the legislation under consideration other than according to the ordinary and usual meaning of the words used. The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies,[2] and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation. This is, in effect, what has been done by the Commissioner and sustained by the Tax Court.
>
> "We have found nothing in section 23(a)(1) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code Sec. 23(a)(1) or in the earlier legislation from which this code provision is derived[3] which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning.[4]
>
> "Therefore the Tax Court in its effort to differentiate between the conceded 'domicile' and 'legal residence' of both petitioners after their marriage and their 'home' at such times, has, we think, invaded the domain of Congress in construing the term 'home' as used in the statute under consideration as meaning 'the taxpayer's place of business, employment or the post or station at which he is employed.' Had Congress intended that

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[1] 144 F(2d) 407.

[2] *Lang* v. *Comissioner*, 289 U. S. 109, 53 S. Ct. 534, 77 L. Ed. 1066; *Lynch, Executrix, etc.*, v. *Alworth-Stephens Company*, 8 Cir., 294 F. 190, affirmed 267 U. S. 364, 45 S. Ct. 274, 69 L. Ed. 660.

[3] See note of Professor Erwin N. Griswold in Vol. LVI No. 7, Harvard Law Review, June, 1943, page 1140 et seq.

[4] *Coburn* v. *Commissioner*, 2 cir., 138 F. 2d 763.

the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent.[5]

"A home in relation to the place of abode is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.[5]

. . . . . .

"The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the *net income* of individuals,[9] and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the courts unless such course would lead to absurd results.[10] We can conceive of no such results by giving to the word 'home' in the application of Section 23(a)(1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed,' as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress[11] to tax *net** income and would in many cases tax the gross instead of the net income of individuals.[12] The court should function to interdict such a result.

. . . . . .

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[5] American Law Institute, Restatement of Conflict of Laws, Section 13.

[9] 26 U. S. C. A. Int. Rev. Code, sec. 11, 52 Stat. 452; *Stewart* v. *Commissioner*, 5 Cir., 95 F. 2d 821.

[10] See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, at pages 332, 333, 59 S. Ct. 191, 83 L. Ed. 195.

[11] *Haggar Co.* v. *Helvering*, 308 U. S. 389, at pages 394, 395, 60 S. Ct. 337, 84 L. Ed. 394.

[12] See 26 U. S. C. A. Int. Rev. Code, sec. 21, for definition of Net Income.

* Underscoring elsewhere in this Brief is ours.

> "The crucial question here is what is the proper construction to be given to an unambiguous income tax statute, and administrative decisions in such matters, while entitled to respect, are not binding upon the court.[14] It is noteworthy in this regard that the Board of Tax Appeals in situations similar to the one involved in this review has construed the word 'home' in like income tax statutes in its usual and common meaning, and not figuratively.[15]

The *Wallace* decision is a direct and authoritative review of the controlling question in this case. It puts the conflicting views of the Tax Court and of the Court of Appeals in bold relief. Here, as in the *Wallace* case, the Tax Court relied upon the *Bixler*, *Peters* and *Priddy* cases. It was on the authority of those decisions and others to the same effect that the Board of Tax Appeals denied the claimed deduction in the case of *Charles D. Coburn*, decided on March 31, 1942, Docket No. 105382, by memorandum opinion.[2]

The *Coburn* case was reviewed by the Circuit Court of Appeals, Second Circuit, and on November 29, 1943,[3] that court, speaking through Circuit Judge Swan, said, in part, as follows:

> "The opinion of the Tax Court states that whether the petitioner is entitled to the first deduction claimed turns on the meaning of the word 'home' as used in the statute; and, following its own earlier decisions, it rules that 'home' means a taxpayer's place of business or the post or station at which he is employed.' See Bixler v. Commissioner, 5 B. T. A. 1181; Duncan v.

[14] *Minnesota Tea Co.* v. *Commissioner, etc.*, 8 Cir., 76 F. 2d 797, affirmed 296 U. S. 378, 56 S. Ct. 269, 80 L. Ed. 284; *Biddle* v. *Commissioner*, etc., 2 Cir., 86 F. 2d 718.

[15] *Griesemer* v. *Commissioner*, 10 B. T. A. 386; G. C. M. 7133, VIII-2, C. B. p. 85; *Brown* v. *Commissioner*, 13 B. T. A. 832.

[2] 46 B. T. A. 1280.

[3] 138 F. 2d 763.

Commissioner, 17 B. T. A. 1088; affirmed 2 Cir. 47 F. 2d 1082; Tracy v. Commissioner, 39 B. T. A. 578; Priddy v. Commissioner, 43 B. T. A. 18. Consequently it held that the petitioner's 'home' during 1938 was in California, since he was there carrying on the business of a motion picture actor.

> "In the ordinary meaning of the word Mr. Coburn's 'home' was in New York, not in California. The Commissioner urges that the statute uses the word in a special 'tax sense' which compels the opposite conclusion. But nothing in the statute bears evidence of any unusual meaning."

The *Coburn* case was the first court review of the unusual holding of the Board of Tax Appeals in the *Bixler* case, and it is significant to note that in the *Coburn* case the court rejected the holding in the *Bixler* case and subsequent cases to the same effect. In fact, the court went even further in the *Coburn* case by holding that whether the word "home" is given its ordinary meaning or some peculiar (tax) meaning, still that Coburn's "home" within the meaning of the statute was in New York rather than in California, and his claimed deductions for traveling expenses and living expenses while away from New York should properly have been allowed. Coburn had spent 263 days of the year in California, having returned to New York only once.

So it appears that the Circuit Courts of Appeals of the Second, Fifth and Ninth Circuits have not been able to find in the statute anything to indicate that the word "home" was used with a meaning other than its well-known and universally accepted meaning. Each of those courts was called upon to deal with the insistence of the Commissioner that there is in the statute some indication pointing to a peculiar and unusual meaning. The courts have not been able to find these indications. In fact, the Commissioner has not, up to date as far as the record shows, been able

to point out the indications upon which he relies. An emergency rule of construction is invoked, but no features of the context can be located for the rule to operate upon. In the instant case the Court of Appeals said: "There is no indication in the statute of a legislative intention to give the word an unusual or extraordinary meaning" (R. 59). The Court of Appeals of the Second Circuit, in the *Coburn* case, 138 F. 2d 763, said: "but nothing in the statute bears evidence of any unusual meaning." The Court Appeals of the Ninth Circuit, in the *Wallace* case, 144 F. 2d 407, said: "We have found nothing in Section 23(a)(1) of the Internal Revenue Code * * * or the earlier legislation from which this code provision is derived which denotes any intent by Congress to attribute to the word 'home' as therein used any unusual or novel meaning."

The rules of construction employed by the Ninth Circuit in deciding the *Wallace* case are beyond controversy. They are rules that have been announced and applied by the Supreme Court of the United States many times. In *Cox* v. *Lott*, 79 U. S. 204, the court said:

> "Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning."

Typical expressions to the same effect are found in many other cases. *DeGanay* v. *Lederer*, 250 U. S. 376, 382; *Avery* v. *Commissioner*, 292 U. S. 210; *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247; *Osaka Shosen Kaisha Line, Claimant, etc.*, v. *United States of America*, 300 U. S. 98.

The word "home" is defined in Webster's New International Dictionary, Second Edition, as "one's own dwelling place; the house in which one lives; esp., the house in

which one lives with his family; the habitual abode of one's family; also a dwelling house. The disciples went away again to their own *home*. John xx 10. 'Without hearts there is no *home*.'—Byron. The social unit formed by a family residing together in one dwelling."

In 29 *C. J.* 767, 768, it is stated that the word "home"

> "has been defined as meaning a dwelling house; a dwelling place; domicile; residence; some permanent abode or residence where the person residing intends to remain; the house or place in which one resides; the place of abode; the place of constant or permanent residence; the place where a person turns for social life, where his family, if he has one, usually dwells, and to which his mind turns when away, and where he has the present purpose of returning and remaining; the place where one and his family habitually dwell, which they may leave for temporary purposes, and to which they return when the occasion for absence no longer exists; the place where one keeps his effects, his chest, etc.; the place where one permanently resides, and to which he intends to return when away from it."

We have quoted hereinabove the following from the opinion of the Court of Appeals of the Ninth Circuit in the *Wallace* case: "Had Congress intended that the word 'home' should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent." The Congress has demonstrated how easily it can do the very thing the court said it could have done in Section 23 (a) (1). In Section 374 of the Judicial Code it is provided that circuit justices and circuit and district judges shall be allowed their "reasonable expenses (not to exceed $10 per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pursuance of law at

any place other than his *official place of residence.*" And further that "The *official place of residence* of each circuit and district judge. * * * shall be at *that place nearest his actual residence* at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his *official place of residence.*" Section 544 of the Judicial Code allows to clerks of United States circuit courts of appeals and deputies and other assistants "their expenses of travel and subsistence, when absent from *official headquarters* on official business." Section 545 designates the place from which traveling expenses shall be allowed as "official residence." Section 560 allows traveling expenses of any clerk of a district court when he is necessarily absent from "his official residence." Section 9 (a) (c) provides for traveling expenses of the court reporters of the district courts. He is allowed such expenses "while necessarily absent on official business from the *place of his regular employment.*" (Emphasis supplied.)

So it appears that when Congress undertakes to describe the place from which traveling expenses may be allowed to the traveler by the government it is able to use language that will correctly describe such place. If in Section 23 (a) (1) Congress had meant to fix the place from which traveling expenses would be allowed as the "place of business or post of employment" those words of description could just as easily have been used as the word "home."

b. TO GIVE TO THE WORD "HOME", AS USED IN SECTION 23(a)(1), ITS USUAL AND OBVIOUS MEANING MAKES THE WORD FUNCTION IN HARMONY WITH ONE OF THE BASIC AIMS OF THE INCOME TAX STATUTES AND THAT IS TO PERMIT CITIZENS TO LIVE WHILE THEY EARN

The income tax statutes assume that the taxpayer has a home; that the home has to be maintained; that the taxpayer must provide the necessities of life for himself before he can pay taxes; that his duty to maintain a family dwelling place and to support his dependents is superior to his duty to pay taxes; even that the claim against him of his dependents has priority over the claim of his government for taxes. Hence an exemption is allowed (Sec. 25) the taxpayer for his own support and an additional exemption for each of his dependents. And Section 23(x) allows deductions for dental and medical expenses. This all recognizes that the home should come first in the appropriation of what the citizen earns; that for himself and his dependents he must first provide food, clothing, health protection, a house to live in and, for the young, education. These necessities have to be met before the taxpayer reaches the point where he can begin to pay taxes; and the citizen who is not able to earn more net income than the maximum of the exemptions and deductions allowed for himself and his dependents does not have to pay any taxes.

The exemptions allowed for the support of the taxpayer's family envision a home establishment in which the earner or producer lives with his dependents. That may be said to be the normal setup. The taxpayer is allowed to deduct from his income the amounts estimated by the makers of the law to be enough to provide the taxpayer and his dependents with the necessities of life if the taxpayer lives at home while he works and earns his income.

There is in the income tax statutes no suggestion that Congress intended to encourage the citizen to move his home as he changes his job or vocation, nor any suggestion that Congress intended to discourage citizens from accepting employment away from home. In fact, Section 23(a)(1) was intended to protect him, to an extent, if he finds it to his interest to take a job away from home.

While the exemptions and deductions allowed may be fairly sufficient to provide support for the taxpayer and his dependents when he lives at home all the time he is working and earning, they clearly are not sufficient for the purpose intended where the man not only maintains a home but goes away from home to work and thus incurs additional and unpredictable expenses in no wise entering into the fixing of the amounts of the household exemptions. In Section 23(a)(1) the Congress has clearly recognized that the arbitrary exemptions allowed to the head of a family for himself and his dependents are not adequate to take care of living necessities where the worker or earner goes away from home to work and earn. It is just as necessary for a taxpayer to eat and to have a place to sleep when he is away from home as it is when he is at home. *He may live where he pleases; he may work where he pleases; Congress has manifested no purpose to control him by taxation or otherwise in the selection of his job or of his domicile. He is not required, is under no moral obligation, to relate his domicile to his work in the way that will produce the greatest amount of tax liability.*

Not only is there no legal requirement or moral consideration to induce the conclusion that where the job is the home is, but such a rule could not be justified on the ground that it would produce more taxes. In many instances the taxpayer who for business or domestic reasons finds it improvident to move to the situs of an available job would

forego the job if he had to decide between the alternatives of paying taxes on the expenses incident to the trips made to perform the work undertaken and of breaking up his home establishment. It could hardly be expected that the taxpayer would take a job that called him away from home unless his net returns from the job would exceed the income he would have if he remained at home. This means that in most instances the Government would get more revenue from the taxpayer who goes away from home to work than it would get out of him if he remained at home even though he should be allowed the expenses incident to his trips from home. Certainly this is a safe observation to make of purely business employments.

While it is true that Section 24(a)(1) denies the right to deduct "personal, living and family expenses" from gross income in order to arrive at "net income", *these same items are taken care of in the allowance by Section 25 of credits against "net income".* These exemptions are to take care of family necessities at home. And they must serve to provide for all the taxpayer's living expenses except such as are incurred when he is away from home in the pursuit of his trade or business. Of course, if he goes on a deer hunt, or attends a ball game, or visits his grandmother, the expenses of his trip may not be allowed as a deduction. He cannot deduct living expenses incurred away from home except when the trips are made to perform the services for which he receives income.

So it appears that Congress has at every turn recognized that the cost of something to eat and a place to sleep may first be paid by the earner before he reaches the tax-paying point. If he lives at home and works, these items are covered by the arbitrary exemption allowances provided by Section 25; if he works away from home he is allowed the expense of traveling back and forth and of meals and lodging. If he travels for an employer who pays his expenses,

then these items are allowed to the employer who pays them. At every place they are taken care of, whoever pays the bill.

It takes time to build the institution called Home. It cannot be created with money alone. Not many can be established by one man for his own use. There is not time enough. It is more reasonable to ascribe to Congress the purpose to encourage citizens to give continuity and permanency to homes than the purpose, by tax regulations, to induce the citizens to try to create a new home with every change of work. The age of the Respondent is not shown in the record, but it is shown that he was admitted to the bar in 1896.

c. TO GIVE SECTION 23 (A) (1) THE MEANING PETITIONER INSISTS UPON WOULD MAKE THE SECTION OPERATE TO INFLUENCE THE CITIZEN IN LOCATING HIS HOME.

The Government does not concern itself with the manner in which the citizen manages his domestic or business affairs or his property. It leaves the citizen free to deal with both as he sees fit. It does not induce him to locate his home or his business or manage either with the object of producing revenue for the Government. It does not limit his freedom to manage his affairs in his own way by any requirement that he take that course which will best serve the Government for tax purposes. He may adopt his own program. He may properly be influenced in his selection of programs of management by tax consideration. "Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which shall best pay the Treasury; there is not even a patriotic duty to increase one's taxes." (Judge L. Hand in *Helvering* v. *Gregory*, 69 F. (2d) at p. 810). It is hardly conceivable that the Congress would require the citizen

to keep his residence at his place of business or the post of his principal employment in order that he might produce more taxes. There could possibly be no other reason to justify a requirement that he live near his business or post of employment. A member of Congress might entertain the opinion that a man can best manage his business if he lives close to it or best perform the duties of an employment if he makes his home near by. But with that, as a lawmaker, he has nothing to do. To say that the citizen must live close by his business or be denied traveling expense deductions would be to write into the statute a rule that would trammel the citizen in the management of his domestic and business affairs. A part of his freedom would thus be taken away for tax purposes. That would be a statute that would influence the selection of a home and of a vocation. If the citizen did not place his home close to his business he would be penalized by taxes on more than his net income.

It must be conceded by all of us that the Congress in the framing of income tax laws has tried to be fair and reasonable. A tax pattern is framed that leaves the citizen free to do as he pleases; free to manage his home and his property in his own way. The citizen may do what he will with his own. It would not do for Congress to say "We will allow you traveling expenses while away from home on business provided you make your home identical with your business location or place of employment. If you locate your home as we suggest then only your net income will be taxed; otherwise, we will penalize you by requiring you to pay on more income than your net." What sense there would be in such a rule is not apparent to us nor to the Treasury Department—at least the sense that would be in it has not been pointed out. We submit that the Congress did not intend to write such a rule into the statute.

There is no possibility that a taxpayer, as represented by Respondent, would set up his home away from his place of business in order to avoid taxes, that is, in order to get a deduction for traveling expenses. The loss the taxpayer bears, due to the necessity of traveling a long distance back and forth, may be three or four times the loss to the Government of revenues due to the deduction of such expenses. Certainly the taxpayer would not incur an expense loss of $1,000 in order to avoid payment of $250 in taxes. Other things being equal, of course he would rather pay $250 in taxes than $1,000 in traveling expenses.

This means that a taxpayer, situated as the Respondent was, in deciding the vital question as to whether he could afford to break up his home to take employment certain for only one year, would have to consider the substantial item of traveling expenses which he would have to pay if he kept his home where it was. Of course he would expect to get a deduction, but if that should amount to $1,000 he would save only $250 in taxes, say, leaving a net loss of $750. In other words, despite the fact that he would have a net additional loss of $750, it may be he could better afford to bear that loss than to undertake to change his existing home. We insist that Congress intended to leave him unembarrassed in the selection of his home location. If he chose to suffer the trouble and inconvenience of travel and incur the net loss of $750, that was his affair. His decision of the question was not to be influenced by the admonition: We prefer that you live at Mobile, the principal post of your employment, and if you decline to do that we will penalize you by requiring you to pay taxes on the amount of your traveling expenses incurred in carrying on your business at that post!

The Congress is concerned with the earning activities of the citizen; leaves him free to manage his domestic affairs in his own way; free to do what he pleases within the law

to earn his livelihood; permits him to pay his expenses out of his earnings before the taxed income is reached. And no statute should be so construed as to require the citizen to locate his home establishment in such way as to minimize expense deductions. The Congress should resent such a construction. It would mean that the Congress intended to complicate or embarrass the citizen in selecting his activity by saying to him that he should stay at home where the exemptions allowed by Section 25 would take care of his living expenses; that if he considered taking employment away from his existing home he must carry his home with him so that these household exemptions would still take care of his living expenses. Thus a revenue statute would intrude upon the citizen's domestic affairs as well as his business affairs.

II

Respondent's Home Was in Jackson, Mississippi, and Therefore the Expenses Incurred by Him While Traveling Away from Jackson on Business Were Deductible in Computing His Net Income.

The Petitioner concedes and the Tax Court found that Respondent's home, in the accepted or ordinary sense of the word, was in Jackson, Mississippi. The admitted facts permit no other contention or holding.

Respondent had a valid, real and substantial business purpose in maintaining his home in Jackson. He not only maintained his home there but he maintained his business establishment there and kept up his business and professional connections. In fact, he was unwilling to have it otherwise. As a condition precedent to his acceptance of employment by the Railroad, it was understood and provided for that Respondent would continue to maintain his home and his connections in Jackson. Respondent had a rea-

son for this. Not just a purely personal reason in the sense that it might be applied to his family or personal living convenience. On the other hand, Respondent's reason for demanding such a condition was a business reason in addition to personal considerations.

The testimony of Respondent on this point is especially illuminating. He said:

> "I should say that I was fairly well established in Jackson; I had lived there practically all the time since I had been (sic) there, offering my services as an attorney and the people I knew lived there and I had my home there, and I had gone to considerable expense to fix up that home and my personal and business connections were all there and I would not have been willing to take the position which I did take if it had required me to move to Mobile, and that was understood at the time, that I could live in Jackson; and then, besides, I had my firm there and my name is still in the firm and for some years I did have other business on the side, business that did not require trials that would consume time, business that involved what you might say were questions which you could take around with you and work out; and besides, I wanted to keep up my connection as far as I could, so that if I should not be re-elected the next year, I would have something to go to. I could not afford to surrender all that and sever my connections. I did not know one year whether I would be elected the next year or not" (R. 35-36).
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> . . . . . .
>
> "—it has been understood, that has been intact, that understanding, all these years, that if I should lose out on this position or resign or if I should give it up, why, I have preserved my business connections there; all I have to do is just to come back to my office and go on as I was before; that has been the understanding all these years, and that has been a very material consideration with me. I didn't want to lose that reserve

and, therefore, kept my connection and kept that understanding alive" (R. 46-47).

The position originally offered Respondent, just as the position he held in 1939-1940, was one of employment by election from year to year (R. 34, 36, 37, 45). Inherent in the position was the element of uncertainty. Respondent was unwilling to sever his connection with the practice of law that he had established for himself in Jackson over a period of nearly a quarter of a century in order to take such a position. On the contrary, he demanded to be allowed to retain his established connection with the law in Jackson and he did retain this connection, continuing his participation in legal affairs and business matters in Jackson, Mississippi.

From time to time since his employment by the Railroad, Respondent had handled legal matters outside of his Railroad employment and at the time this cause was tried was actually engaged in such an outside matter (R. 47). And though he did not participate in any of the profits of his firm in which he had taken no part, he had at all times retained his connection with the firm, was a senior member of the firm, might resume participation in the firm profits at any time he wished, and, when he was in his office in Jackson, Mississippi, he was available to members of his firm for consultation on matters connected with the Railroad and matters not connected with the Railroad, and was frequently consulted by other members of his firm on both classes of questions (R. 37). In some years he had profitable business at his law office; in other years he had none.

The division of Respondent's time between his office at Jackson and his office at Mobile was left to him. As General Counsel of the Gulf, Mobile and Northern and later as Vice President and General Counsel of the Gulf, Mobile and Ohio, Respondent was responsible for the work of the Legal

Department of the Railroad. A large part of the work of this Department has to do with matters arising in the State of Mississippi, since such a large portion of the property is located in that State. Jackson is the capital of the State of Mississippi, the most important city in the State, and the most important point served by the Railroad in that State, and is the place at which the most of the Railroad's business in the State was transacted (R. 37, 38, 39, 40, 44).

The number of trips made by Respondent from his home in Jackson, Mississippi, and Mobile, Alabama, and the length of time spent in Mobile and in Jackson varied from year to year dependent upon the character of the principal problems being handled by him. During the year 1939, Respondent made 33 trips between his home in Jackson, Mississippi, and Mobile, Alabama; he was at Jackson approximately 203 days and in Mobile 66 days and was elsewhere (that is, places such as Washington, Chicago, New York, etc.) approximately 96 days. During the year 1940, he made 40 trips between his home in Jackson, Mississippi, and Mobile, Alabama; was in Jackson approximately 168 days; was in Mobile approximately 102 days, and was elsewhere (that is, places such as Washington, Chicago, New York, etc.) approximately 96 days (R. 17, 18, 38, 39).

Respondent's trips between his home in Jackson and Mobile were usually by train and necessitated, for the most part, a stopover in New Orleans for the night. He estimated that it cost between $10 and $14 to make the trip between Jackson and Mobile, in either direction, and that his living expenses in Mobile, including his hotel accommodations and meals, averaged not less than $8 per day (R. 40, 41, 42, 43).

Respondent is a lawyer. His position with the Railroad was a law position. He would not be qualified for such position if he were not a lawyer. The practice of law is regulated by the several states. Only those who have been

admitted on proper showing, regularly pay the required license fees and, where the law so requires (and the law does so require both in Mississippi and in Alabama), are members of the state bar association, are qualified to practice. Respondent could not properly hold the position he held and continue to discharge the duties of his position absent the showing on his part that he was duly qualified and licensed to practice law. *Schurer* v. *Commissioner*, 3 T. C. 544.

Respondent is a Mississippi lawyer. That is, he has been admitted to the bar in the State of Mississippi and it is under the laws of the State of Mississippi that Respondent was qualified to perform the duties required of him by the Railroad. He was a member of the Mississippi State Bar and paid the required license fees each year in the State of Mississippi.

Respondent could only earn his railroad compensation by doing the work required of him. He testified that he would not have accepted the Railroad position if it had required him to move his home away from Jackson and sever his business connections there. The Railroad agreed to these conditions. In other words, in order to perform his duties, it was necessary that he thus incur traveling expenses. While in Mobile it was necessary that he provide himself with food and lodging in order to live. These are the kinds of expenses the deduction of which is allowed and provided for in Section 23(a)(1). Had they not been incurred there would have been no business and no resulting income, and, of course, no tax. The expense and the income arose out of the same circumstances. Compare *Stewart* v. *Commissioner* (C. C. A. 5th), 95 F. (2d) 821. Without the one the other could not have resulted. They depended on each other. To sustain Petitioner's position would mean the imposition of a tax on the expense of Respondent's business, rather than on his income from the business.

Respondent was free to make his home wherever he saw fit and for whatever reason. He was free to engage in any lawful business he might desire. Since his business required him to travel away from his home and thus incur expenses, then under Section 23(a)(1) he was entitled to a deduction of those expenses from his income before paying his income tax. He cannot properly be required to pay tax on his expenses. The tax in question is a tax on *net* income, not gross income.

III

Section 23(a)(1) of the Revenue Act of 1938 Is Not Ambiguous. The Word "Home" Used in the Statute Is Not a Word of Uncertain Meaning. Hence there Is No Occasion to Invoke Various Rules of Construction.

All the argument of counsel for Petitioner assumes that the word "home" is a word of doubtful meaning. It is the use of that word which counsel say renders the provision ambiguous and warrants the invocation of the rules of construction that are employed by the courts to resolve doubts. Let it once be determined that the word in question has an established meaning, universally understood, then there remains no necessity to call in the aid of emergency rules.

Adams Express Co. v. *Kentucky*, 238 U. S. 190, 199;
United States v. *Hill*, 248 U. S. 420, 424;
United States v. *Standard Brewery*, 251 U. S. 210, 217;
United States v. *American Trucking Ass'ns*, 310 U. S. 534, 542, 543, and cases there cited.

If the court finds that the said word has a plain and commonly accepted meaning, such finding ends this controversy.

IV

The Several Rules Invoked by the Petitioner

1. *Legislative Grace*

In the first place, it is undertaken to find a burden of proof resting upon the taxpayer to show that the deduction claimed is provided for by a statute. Of course if the statute is plain the burden in the instant case is met. The rule invoked at this point is (Br. 12) the "now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing a right to the claimed deduction is on the taxpayer." It is not obvious how the enactment of a fair statutory provision may be designated as an act of legislative grace. If the expression means anything it can only mean that the Congress yielded something it did not have to yield; that it had power to do otherwise; that it could have created a burden harder for the taxpayer to bear. Perhaps the reserve of grace upon which the Congress is permitted to draw is the power to tax gross income. The Congress has not undertaken at any time to do that. It has been recognized that the expenses of earning income *must* be paid; that the real income is the difference between the amount earned and the cost of producing the earnings. Counsel for Respondent would say that to permit the expenses of earning income to be paid before the amount to be taxed is determined is an act of legislative grace; that is, that the Congress could tax the whole and that through kindness Congress permits the expenses first to be paid. Of course, no business could be carried on without expense. No income could be earned without cost. It might just as well be said that it is an act of legislative grace to allow exemptions to help take care of family living expenses, so much for the head of the family and so much for each dependent. The Congress has the

power, perhaps, to take away these exemptions and leave the head of the family under an obligation to meet taxes first and support his dependents afterwards, if anything is left of his income. Counsel would say that for Congress to permit a citizen to take care of his family is an act of grace. The taxpayer must eat, and wear clothes, and provide for himself a place to live. He is supposed to have a family, the members of which must be fed and clothed and provided with a home. The children must be sent to school. A pittance in the form of an exemption is allowed to be taken out of the total earnings to arrive at the amount to be taxed. This granting to the citizen the right to make some provision for the care of his family before he reaches the tax-paying point is, in the eye of the Petitioner, an act of legislative grace. Is it possible that any use by the Congress of less than all the power it possesses is an act of legislative grace? Does it have a reserve of royal grace upon which it can draw drafts? Is it an act of grace to do the fair and reasonable thing? Are taxpayers dependent upon legislative charity?

Mr. Justice Van Devanter seems to have first mentioned "legislative grace," in *New Colonial Co.* v. *Helvering*, 292 U. S. 435, at p. 440. There the taxpayer was claiming a deduction in one year for a loss sustained in another year and it was said that usually a year stands apart for the computation of gains and losses. And then the loss was not one originating in the taxpayer's own business but in that of a subsidiary whose losses taxpayer had contracted to pay. It might be said that it would be an act of grace to permit a taxpayer to deduct from one year's income losses suffered in a past year by another taxpayer. The court cited *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326, which also involved a claim for deduction of a loss for a previous year; and *Planters Cotton Oil Co.* v. *Hopkins*, 286 U. S. 332, involving a similar claim; and *Helvering* v.

Independent Life Insurance Co., 292 U. S. 371, wherein the court said (p. 381), "Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax." Congress is presumed to be fair whether it uses all or only a part of the power the people have given it. It has no reserve of grace to draw upon. The people have not provided such a reserve.

2. *The Context*

Another rule invoked is that if a word or term in a statute is of uncertain meaning the context will be examined in a search for an explanation.

At another page of this brief we have already quoted statements made by the three Circuit Courts of Appeals that first had occasion to define the word "home" as used in 23 (a) (1) to the effect that they were not able to find anything in the context to indicate that the word was used in an unusual or special sense. Counsel for Petitioner invoke the rule but have pointed out nothing in the context that can be utilized. There is in the context nothing to indicate that the word "home" as used in Section 23 was intended to mean anything except what it obviously means.

Section 24 (a) certainly cannot be held to nullify Section 23. The expenses allowed by 23 (a) (1) are such as are incurred while traveling on business. The citizen is earning income and he is allowed to pay the expenses incident to his activity. Certainly "*all* the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses (including the *entire* amount expended for meals and lodging) while away from home in the pursuit of a trade or business" covers items which, unless connected with the carrying on of a trade or business, are personal and living expenses. Traveling on business is one thing,

traveling on a hunting trip or on a vacation is another thing. It is not clear how counsel find in 24 (a) (1) anything to suggest some unusual meaning for the word "home" used in Section 23 (a) (1). Personal living or family expenses incurred away from home are not allowable deductions unless they are connected with the "carrying on" of a "trade or business." This is admitted. Section 24 (a) (1) may serve to help classify personal and living expenses of the kinds enumerated in 23 (a) (1)—that is, that railroad fares, meals and lodging are allowable under 23 (a) (1) when the taxpayer is away from home carrying on a trade or business but are not allowable deductions when he is traveling for non-business purposes. This meaning is recognized by counsel in their effort, by repetition, to give substance to their suggestion that this Respondent claims deductions of expenses incident to trips made from Mobile to visit his family in Jackson, when nothing of the kind occurred.

3. *Inequitable Results*

The next rule relied upon by Petitioner is that a construction that would lead to inequitable results will, if possible, be denied. It is not clear what inequitable result the Petitioner's definition of "home" would avoid. It is said (Br. 8) "It (Respondent's definition of 'home') imputes to Congress an intention to discriminate in favor of those taxpayers who are able to own or rent several dwelling places simultaneously, one where their work requires them to be and one or more elsewhere." And there is a suggestion at page 10 that to give the word its usual meaning would result in "discrimination against those whose only dwelling place is at their post of duty."

It should be clear that the man whose place of business is away from his home is the unfortunate one; that he is the man who has to bear the expense and inconvenience of

travel; the one who has the larger burden of living costs. Of course he may have a larger deduction to claim and his taxes may be reduced; but what he saves in taxes may not exceed a fourth of his deduction loss. A taxpayer cannot be regarded as favored who may spend $1000 and thereby save $250. If he happens to live at his place of business he saves the entire $1,000 and pays $250 more in taxes. Other things being equal, any taxpayer would prefer to have his home and his business at the same place. Fortunate is the man who has his home and family where his business is located. He is relieved of the worry and expense and inconvenience of monotonous travel over the same route; can have the comforts of home; can make better use of his time. The features of such cases that counsel fail to see are that deductions are *losses*; that the amount has to be paid out before it can be claimed as a deduction; that the *loss* in expenses is three or four times the *saving* in taxes.

At no time did Respondent have two "dwelling places"; his one and only "dwelling place" was at Jackson; and from that one dwelling place he made brief trips to Mobile where he engaged a hotel room for use while there just as other travelers do.

4. *Reenactment of the Statute*

The rule for which counsel for Petitioner here contend is inapplicable. Administrative construction contrary to the terms of a plain statute may not be taken as having been adopted by a subsequent reenactment of the statute. *Riddle* v. *Commissioner*, 302 U. S. 573, 582; *Iselin* v. *United States*, 270 U. S. 245, 251; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 758, 759.

As we have shown elsewhere herein, the Regulations were not and are not in conflict with the statute; they follow the words of the statute. The conflict, if any, is between the

statute and the Regulations on the one hand and departmental rulings in individual cases on the other hand, which rulings are neither made nor approved by the Secetary of the Treasury. Compare *Biddle* v. *Commissioner*, supra; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467, 468; and *Sandford's Estate* v. *Commissioner*, 308 U. S. 39, 53.

Even if these segregated rulings could be treated as being on a basis of equality with the Regulations to which they are opposed, they could not be permitted to work a modification or repeal of the statute. The lawmaking power is in the Congress, not the executive branch of our Government. The Congress has not delegated and cannot delegate its legislative power. Laws are not made by or through the medium of informal administrative rulings which amount to little more than interdepartmental memoranda. *Manhatten Co.* v. *Commissioner*, 297 U. S. 129, 134, 135; *Helvering* v. *Oregon Ins. Co.*, 311 U. S 267, 271-272; *Taft* v. *Helvering*, 311 U. S. 195, 198-199; *Miller* v. *United States*, 294 U. S. 435, 439-440; *Helvering* v. *Powers*, 293 U. S. 214, 224; *Lynch* v. *Tilden Co.*, 265 U. S. 315, 321; *United States* v. *George*, 228 U. S. 14, 22; *United States* v. *United Verde Coffee Co.*, 196 U. S. 207, 215; *United States* v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571, 576.

V

As to the Construction of the Statute by the Tax Court and the Treasury Department

The Treasury Regulations embody the authoritative rules of the Treasury Department adopted for the practical application of the revenue statutes (I. R. C., Sec. 4041, Sec. 3591 and Sec. 62). They deal with the facts of no single case; they make public the rules that the Bureau of Internal Revenue is expected to apply.

The Secretary promulgated a rule with respect to Section 214 (a) (1) of the Revenue Act of 1921. The Regulation was approved February 15, 1922. It has been in force in substantially the same form as when first adopted, up to the present time. The section of the 1921 Act with which that Regulation dealt was, as to the provisions with which we are now concerned, the same as Section 23 (a) (1) of the Act of 1938.. Said Regulation appears in the appendix to the brief of the Petitioner. It will be noted that the language of paragraph (a) (1) of the Regulation is practically the same as the language of the paragraph so numbered of the Act. The Regulation uses the language "traveling while away from home solely in the pursuit of a trade or business." The language used is exactly that used in the statute except that the Regulation introduces the word "solely." There is in the Regulation no suggestion that the word "home" means other than what it ordinarily means; no suggestion of ambiguity to be cleared up. It follows the language of the statute. *If the statute is ambiguous then the Regulation is equally ambiguous.*

If the Department found in the statute a common word whose meaning is familiar to everybody and discovered at the same time that this word was to be given a different meaning, certainly the occasion called for an announcement of the meaning the Department proposed to give it. If the draftsman was advised of the unusual meaning that was to be given to the word it is difficult to see how he could be blind to the necessity of advising the public of the special meaning proposed to be given it. We can hardly avoid the inference that the authors of the Regulation were not willing to commit themselves to a definition of the word that would be such a radical departure from the meaning of the term that people in general give to it. The peculiar definition has been kept out of the authoritative and final rules promulgated for public use. The silence of the Regulation

on the subject indicates, at the minimum, that the special meaning had not yet been discovered, or if it had been suggested, uncertainty or lack of confidence on the part of the authors of the Regulation. To put the special definition in a Regulation would be a challenge.

The Regulation does itemize to an extent traveling expenses "as ordinarily understood," including railroad fares, meals and lodging. But the Regulation recognizes no necessity to throw any light on the meaning of the word "home" as a designation of the place from which the taxpayer may be traveling when he incurs expenses that are allowable deductions. It assumes, as a matter of course, that everybody knows what the place is that is called home; no explanation is needed; the term is well understood and needs no definition. It may be assumed that counsel for the Department who drafted or approved the Regulation was familiar with the rule so well expressed by the Court in *Addison v. Holly Hill Co.* (322 U. S. 607, 618), that "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Six of the eight paragraphs of the Regulation deal with traveling expenses. The word "home" is mentioned more than once as the designation of the place from which the taxpayer must have traveled. It was assumed that the word as used in the statute had no hidden or special meaning of which the public should be advised.

And there is no Treasury decision that commits the Department to the definition Petitioner depends upon in the instant case. At least we have found no such decision, and counsel for Petitioner cite none. We submit to the Court that the Board of Tax Appeals in the *Bixler* case, 5 B. T. A.

1181, originated the wry definition of home that Petitioner here relies upon. We have seen that in that case the taxpayer did not appear by counsel; that the new definition had nobody vouch for it but the Board; that no reasons were given, no authority cited. Certain it is that the Treasury Regulation (then designated as Article 101 (a) of Reg. 62) was not cited by the Board, although the regulation, substantially in the form of the current Sec. 19.23 (a) (1) and (2), was about five years old. Certain it is, too, that the said Regulation, if cited, would have furnished no encouragement to the Board in adopting the new definition.

And even after the Regulation was promulgated there were decisions by the income tax unit (not cited by counsel for Petitioner) that gave to the word "home" the same meaning Respondent here insists that it has and has always had. In IT 1490 and IT 1497, p. 89, Cum. Bull. 1-2 (July-Dec. 1922), Webster's International Dictionary is depended upon for the definition of "home." Both of these decisions purported to be in accord with the Regulation and to have been controlled by it.

As far as we have found, the Bureau of Internal Revenue never employed the *Bixler* definition of the word "home" until the year 1928, a year after the *Bixler* decision. (G. C. M. 4956, Cum. Bull. VII-2, p. 129, July-Dec. 1928).

And if the *Bixler* decision discovered a new meaning for the word the Department did not change its Regulation to conform to the discovery. It is evident that no such special meaning was attributed to the word when the said Regulation was drafted. *It may be safely affirmed that if there had been any confidence in the Bixler definition and the Department was willing therefore to back it, the Regulation would have been amended accordingly.*

Counsel for Petitioner does not insist that the Regulation supports their theory; it is only said that it is consonant

with their theory (Br. 9). But it is "consonant" with counsel's theory only provided the term is given a meaning that is not indicated by the manner of the use of it in the Regulation.

And the Board of Tax Appeals has not consistently followed the *Bixler* decision. It can only be safely said that the Board of Tax Appeals has followed it in the *Priddy* (43 B. T. A. 18), *Peters* (19 B. T. A. 901), and *Lindsay* (34 B. T. A. 840) cases. See *McCruden* v. *Commissioner*, Docket No. 87806 (entered Feb. 7, 1938); *Brown* v. *Commissioner*, 13 B. T. A. 832; *Joseph W. Powell* v. *Commissioner*, 34 B. T. A. 655; and other cases cited herein.

And the first time the question reached a court the rule of the *Bixler* decision was condemned (*Coburn* v. *Commissioner, supra*, Second Circuit). And the second time the question was presented to a court was in the *Wallace* case (*Wallace* v. *Commissioner, supra*, Ninth Circuit). Here again it was condemned in emphatic language. The third time the question got into court was in the instant case (Fifth Circuit), where the rule of the *Bixler* decision was again convicted of being unsound.

And after the Court of Appeals of the Second Circuit, in the *Coburn* case, refused to adopt the special definition of the word "home" the Tax Court began to treat the *Bixler* decision as being of little use. It is now in disrepute. *Harry F. Schurer*, 3 T. C. 554; *Gustafson* v. *Commissioner*, 3 T. C. 998; *Harroun* v. *Commissioner* (Memo. opinion, Docket No. 5869, entered July 20, 1945); *Mahony* v. *Commissioner*, —— T. C. —— (entered April 10, 1945); *McLennon* v. *Commissioner*, —— T. C. —— (June 25, 1945); *Robert S. Shelley, deceased*, v. *Commissioner*, —— T. C. —— (June 25, 1945).

Our confidence in the position of the Respondent in this case is strengthened by the absence from the opinions of the Courts of Appeals of the Second, Ninth and Fifth Cir-

cuits of statements as to the history of the present Regulation (Section 19.23(a)(1)) and as to the origin of the peculiar definition of home depended upon by Petitioner. And there is nothing in the opinion of the Court of Appeals of the Fourth Circuit in the *Barnhill* case to indicate that that court was in possession of these historical facts.

Treasury Regulations in Effect Prior to the 1921 Prototype of Section 23(a)(1).—Those Regulations shed light on the meaning of the word "home" as used in 23(a)(1) and on the use of the word "all" and of the word "entire." Treasury Decision 3101 (3 Cum. Bull., page 191), approved December 16, 1920, amended Article 292 of Regulations 45. Former Regulations had allowed one traveling on business "only his railroad fares and other incidental expenses attributed to the business and no expenses for meals and lodging were deductible for income tax purposes, on the theory that expenses for meals and lodging were necessary expenses within the purview of Section 215 of the Revenue Act of 1918." (Cum. Bull. No. 4, page 209, Memo. 2688.) The amended Article 292, approved December 16, 1920, allowed a taxpayer traveling on business not only his railroad fare but meals and lodging. However, the amount he could get for meals and lodging was measured by his expenses at home. He had to attach to his returns statements showing to what extent his living expenses were increased by his traveling away from home. Attention was given to the fact that his living expenses when at home were taken care of by the exemptions which at that time were $2000 for the head of the family and $100 for each dependent, and for a single man $1000. The home the Regulation dealt with was the place where the family lived. There is no intimation as to where the home should be located with respect to the business on which he was traveling. In the prior Regulation the theory was that the cost of meals and lodging was covered by the household exemptions,

whether incurred at home or away from home; that the only additional expense incident to traveling that was allowable was the transportation expense, railroad fares. The idea was that the taxpayer with a family at home was alread getting a deduction to cover the cost of meals and lodging and that if this should be allowed to him as an incident of his traveling he would get two deductions of the same expense. In other words, under the prior Regulations the taxpayer could deduct no part of his expense for meals and lodging, but under the 1920 amendment (Article 292 of Regulations 45) he was allowed such portion of his living expenses when traveling as he was able to show was in excess of such expenses when at home. He had to show how much his living expenses were increased by his traveling on business.

But after the enactment of Section 23(a)(1) (214(a)(1) of the Revenue Act of 1921) a new Regulation was adopted, to give effect to the new provisions, which adopted a theory wholly different from that of the preceding Treasury Regulations. Whereas Article 292, promulgated the year before, allowed the man traveling on business a deduction of a part of his living expenses while away from home, and the same Regulation prior to January 1, 1921, allowed him no part of such traveling expenses, the new Regulation (in substantially the same form as the present Section 19.23(a)(1)), following the language of the 1921 statute, allowed him all his traveling expenses. The Treasury Regulation evidently prompted the use by the Congress of the word "all" in defining business expenses and the use of the word "entire" in defining the traveling expenses that should be allowed. The use of these words recognizes that theretofore the man traveling from home could get only a part: the Congress said that he was entitled to the "entire amount expended for meals and lodging." It was intended to make

it certain that his expenses when traveling away from home on business should be treated as additional living expenses no part of which was covered by his household exemptions.

It is expressly to be noted in this connection that the *home* referred to in Article 292 of Regulations 45 was the institution that everybody knows by the name of home. And we have seen that in the year 1922 the Income Tax Division of the Department was using the same definition of the word "home" that we here insist upon and even citing the same authority. (See opinions cited at page ——, supra.) There was no requirement that the taxpayer make a showing as to how his home was located in relation to his business or employment. All travelers away from home were treated alike. There was in the previous enforcement of the statute by the Treasury Department no suggestion to indicate to the Congress that the word "home" had acquired or was to be given any novel or unusual meaning.

When the 1921 Revenue Bill was under consideration, the Committee on Ways and Means in its report on the measure said: "Section 213 would permit (in the computation of net income) the deduction of all traveling expenses incurred in the pursuit of a trade or business, instead of the more limited deduction for such expenses allowed under the present law." (Cum. Bull. 1939-1, par. 2, p. 177.) We have elsewhere called attention to the fact that the Bureau of Internal Revenue had adopted the definition of the word "home" found in Webster's International Dictionary.

As to the exception in 19.23(a) (1) of the Treasury Regulations of commuters' fares from allowable business expenses. We have above herein called attention to the fact that the Regulation dealing with 23 (a) (1) does not undertake to explain 23 (a) (1); does not ascribe to it any meaning other than what it obviously carries; does not attribute to the word "home" any meaning other than that it ordi-

narily implies. But counsel for Petitioner refer to the last paragraph of the Regulation as furnishing support for their contention that the word "home" is treated as having a peculiar meaning.

It is necessarily a question of fact in every case as to where the taxpayer's home was at the time traveling expenses were incurred. In the instant case this question of fact is not in dispute. It is conceded that the taxpayer had in Jackson, Mississippi, a long-established home where he lived with his family throughout the period involved. He lived some 200 miles from the post of his principal employment, and when he traveled by rail the distance was approximately 340 miles.

But where the citizen lives near his place of employment the question may arise as to whether he is traveling on business when he goes from his home to that place. It would hardly be contended that the man who lives and works in the same city travels away from home when he goes in the morning to his place of employment, although he may have to travel miles; nor would it be so contended as to any man who lives so close to the city where he works as to make his home, in the general view, identical with the city. As the distance between the home and the place of business increases, the nearer the approach to a doubtful question of fact. The man in the suburbs or in an adjacent town or city may still be so near his place of business as to preclude any dispute as to whether in going to and from his place of business he is *traveling* within the generally accepted meaning of that word. The term "travel" usually connotes some considerable distance, "to make a journey; to pass to a distant place or to many places" (Webster's International). The Regulation undertakes to dispose of the question in so far as it may arise with respect to persons located within a certain definable area around the place of business. It provides that "commuters' fares are not con-

sidered as business expenses and are not deductible." The evident purpose was to exclude commuters from the category of travelers; to make it plain that the Bureau would not regard the expenses of commuters going to and from their places of business as traveling expenses. It covers income tax questions for a large class of taxpayers. The word "commuter" is not in the statute. When it was adopted by the Treasury Department it had a well-known meaning. Perhaps the Interstate Commerce Commission has furnished the best statement as to the history and meaning of the word in 21 I. C. C. 428. It is there explained that the commuter rides from his home in a suburban or nearby community to his place of business and back; usually makes the trip every day; uses some kind of coupon tickets, gets low rates. The Supreme Court said, in *Pennsylvania Railroad Company* v. *Towers*, 245 U. S. 6, 12, "The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the one-way passenger.

"It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. * * * On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic." The Regulation provision had the purpose of making it clear that commuters would not be treated by the Bureau of Internal Revenue as persons traveling away from home on business when they go from their homes to their places of business or employment. They are not to be treated as travelers. Their expense is relatively small;

they spend usually as much of the 24 hours at home as they spend away from home. It is part of their daily routine. They do not have the inconveniences or the expenses of travelers away from home. The home exemptions take care of their living expenses approximately as if they had their home and employment under the same roof.

But certainly this treatment of commuters' expenses ascribes no special meaning to the word "home". It only defines a class of persons who shall be treated as having their home and their business at the same place. Persons in this class are not to be given the deductions allowed to those who travel away from home. They are not travelers. The assumption would be that persons going away from home to work, who are not commuters, are entitled to the traveling expense deduction. This is the only class that the Regulation defines; and it was appropriate for the Regulation thus to define a class of persons whose situation would take them out of the category of travelers. It is in harmony with the statute as we construe the statute. It gives no unusual meaning to the word "home" but only lays down the rule that commuters shall be treated as living and working at home without any necessity for travel. The time and inconvenience and distance incident to travel are not present in the commuter arrangement. The rule has a bearing upon the income tax returns of (according to the Supreme Court) "thousands of persons."

Conclusion

The facts in this case are not in dispute. The Respondent claims deductions for expenses paid by him while away from home on business. The abode he was away from was his real "home" as that word is commonly understood. It was not a temporary establishment. At the beginning of 1939 it was some 27 years old.

The sole issue arises over the meaning of the word "home" as used in Section 23(a)(1). Petitioner contends that the word was intended to be given an unusual meaning. The meaning contended for by the Petitioner is not disclosed by the statute. The statute contains no definition of the word. It needed no definition. Petitioner contends that the meaning he proposes for the word has been attached to it by administrative action.

Since it is one of the most familiar words in the language its use could create no ambiguity. No different meaning could be injected into it by the Treasury Department. The only rule of construction that is applicable is the rule that the plain words of a statute are to be taken as expressing the intent of the legislature. Other rules are invoked as aids in instances where the terms of a statute are not plain. The Congress is presumed to have said what it intended.

Moreover, Petitioner has wholly failed to show that the Department has ever adopted or approved a definition at variance with the universally accepted meaning of the word.

The one Regulation, Section 19.23(a)(1), has been in its current form, in so far as its application here is concerned, since 1921. It follows the language of the statute. If the Department had in mind a novel definition of the word the place to make it known was in this Regulation. The office decisions made in 1922 (IT 1490 and 1497, p. 89, Cum. Bull. II2, July-Dec. 1922), after the promulgation of the said Regulation, indicate that there was in the atmosphere of the Department no notion that the word "home" used in the Regulation had an undisclosed meaning. The definition used was that found in Webster's Dictionary.

We submit that there is no indication in the record of the Department's acts to indicate that the definition insisted upon was even thought of at the time the Regulation was promulgated or for years thereafter; that the suggestion

was first made by the Board of Tax Appeals in the *Bixler* case. And further that the rule proposed in the *Bixler* case was a mere *ipse dixit*, having no reason or authority to support it. The Bureau of Internal Revenue has made use of it now and then where it could be employed to advantage, but the Treasury Department has never committed itself to it by any Regulation, nor, in so far as we or counsel for Petitioner have discovered, by any Department decision.

The Board of Tax Appeals applied the new rule in a few cases and managed to avoid it in a number of others. And the Tax Court, as shown by cases cited in this brief, has practically repudiated it without expressly saying so.

The issue created by the Board of Tax Appeals' proposed definition did not get into the courts till 1943 when it turned up in the Circuit Court of Appeals for the Second Circuit. That court refused to approve the *Bixler* case definition. Then the issue arose in the Circuit Court of Appeals of the Ninth Circuit and was condemned in language quite positive. Its next appearance was in the instant case and the Court of Appeals for the Fifth Circuit also found no support in the statute for the peculiar definition first employed in the *Bixler* case.

Each of the said Circuit Courts of Appeals, examined the statute to see what there is in the context to indicate that the term "home" was intended by the Congress to be given an unusual meaning. None of these courts found anything of that nature. If there is any such illuminating feature in the context, certainly it is hard to find or one of these able courts would have discovered it. On the other hand, the history of the statute and of the changes in the Regulation that resulted in the current Regulation, 19.23(a)(1), shows that the Department clearly saw the pattern Congress had framed with this Section 23(a)(1) in it. Families at home were to be provided for; and exemptions for that purpose were allowed. Some

citizens find it to their interest to go away from home to work; and such travelers away from home also have to live; on trips from home they incur living expenses not covered by the household exemptions. But the citizen going away from home may deduct only such expenses as are incident to his business activity; he cannot deduct traveling expenses incident to pleasure or social or other non-business travel (Sec. 24).

The Congress intends to tax *net* income. There can be no net till the expense incident to the earning is paid. The citizen is free to manage his domestic and business affairs in his own way. If he can earn more income, that is, if it is to his interest to go away from home, Congress says to him that the incidental expenses will be allowed. The location of his home is an important matter with the citizen. Congress knows that. To break it up and move it and establish it somewhere else is a matter of large importance to the family. The Congress leaves him to deal with that problem in his own way. To help him to deal with it, however, the Congress tells him that if he does find it to his interest to go away from home to carry on a trade or business his expenses incidental to his business trips may be deducted from his income before the tax rates begin to attach. The Congress gives the citizen the right to deduct his traveling expenses when on business trips away from home. There is attached to this grant no condition to the effect that such expenses will be allowed only provided the citizen will establish his home close to his principal business. Such a condition, Petitioner insists is implied. Such a condition, written into the act, would be of as vital importance as the grant itself. In the *Bixler* case it was undertaken to write such a condition into the statute.

The present statute and the present Regulation, as shown by their history, were the outcome of controversies with respect to expense deductions. At first, living expenses

incurred by the taxpayer when away from home were not allowed, the assumption being that his household exemptions took care of that. The next step was to allow him living expenses when away from home if he was able to show that they exceeded the living expenses he would have incurred if he had stayed at home. And then the Act of 1921 gave him the right to deduct all such expenses, including the *entire* amount expended for meals and lodging. While these said controversies were on, as far as the record shows, there was no uncertainty as to what was the "home" from which the traveling expenses were to be measured.

All we have said herein is supported by the decision of the Court of Appeals of the Fifth Circuit, which decision, we submit, was correct and should be affirmed.

Respectfully submitted,

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